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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 661.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Statement of the Case 2

A. Preliminary Statement 2

B. The Statute 4

C. Statement of Facts 5

(1) The commencement of the New Haven reorganization proceedings 5

(2) Early unsuccessful efforts through court action (*Palmer* v. *Massachusetts*) to reduce the Old Colony passenger service deficits during the reorganization proceedings and thus facilitate reorganization of Old Colony 5

(3) Later successful efforts under the doctrine in *Palmer* v. *Massachusetts* to supersede, through a plan of reorganization, the portion of Massachusetts law that required the continued operation of the Old Colony passenger service. 6

(4) History of the operation of Old Colony passenger service by the New Haven (a) from September 18, 1947 to October 1, 1948 under the contractual obligation imposed by the plan following termination of franchise and statutory obligations and (b) from October 1, 1948 to March 1, 1949 after termination of the contractual obligation and during the period in which the New Haven, at the request of the Commonwealth, had agreed to extend the time for discontinuance 11

PAGE

(5) Court proceedings with respect to the Old Colony passenger service on and after March 1, 1949 14

D. Questions Presented 15

Argument:

POINT I—The petition should be denied because the ground upon which it is rested was not raised in either of the Courts below, and, moreover, is flatly inconsistent with Petitioners' claim in both those Courts 18

POINT II—The petition should be denied because the District Court's construction of the plan of reorganization was final and conclusive, no abuse of discretion being shown 20

POINT III—The District Court and the Court of Appeals were plainly right in holding that on March 1, 1949, the New Haven could take off part of the passenger service on the former Old Colony lines and continue operation of the remaining part that served 86% of the public 22

A. Before March 1, 1949, the plan of reorganization had relieved the New Haven and Old Colony of every conceivable obligation to operate any part of the service 22

B. There is nothing in the words "may be discontinued" in Section N(3)(a) of the plan that suggests either a command to remove all the passenger service, or a prohibition against partial discontinuance of it, upon termination of the contractual obligation to operate it. Any thought that service must be taken off is negatived by the word "may" 24

PAGE

C. Petitioners are in error in stating that prior to approval of the plan the Commission refused to provide in it for curtailment of Old Colony passenger service 29

D. The petitions for authority to curtail passenger service which were filed with D. P. U. by the New Haven during the first critical period are irrelevant in the present case 30

E. Petitioners are in error in stating that the District Court's construction of the plan deprived Massachusetts of all regulation of intrastate passenger service on the Old Colony Division 31

Conclusion 33

TABLE OF CASES CITED:

Adams v. *Mills*, 286 U. S. 397 20

Brownell v. *Old Colony R. Co.*, 164 Mass. 29 (1895).. 22

Commission of the Dept. of P. U. v. *N. Y. N. H. & H. R. R. Co.*, 178 F. 2d 559 2

Commonwealth v. *Fitchburg R. Co.*, 12 Gray (Mass.) 180 (1858) 22

Converse v. *Commonwealth of Massachusetts*, 101 F. 2d 48, 2 Cir., 1939 6

Husty v. *U. S.*, 282 U. S. 694 20

Institutional Investors v. *Chicago, M. St. P. & P. R. R. Co.*, 318 U. S. 523 (1942) 21

N. Y. N. H. & H. R. R. Co., In re, 54 F. Supp. 595.... 9

PAGE

N. Y. N. H. & H. R. R. Co., In re, 147 F. 2d 40, cert. den., *Commonwealth of Mass.* v. *N. Y. N. H. & H. R. R. Co.*, 325 U. S. 884, rehearing den. 326 U. S. 805 ..... 9, 10

New York, New Haven and Hartford Railroad Co., Plan of Reorganization:
239 I. C. C. 337 ..... 6, 7
244 I. C. C. 239 ..... 7, 8
254 I. C. C. 63 8
254 I. C. C. 405 ..... 9, 29
257 I. C. C. 9 ..... 3, 3n, 4, 9, 10, 20
261 I. C. C. 195 ..... 7, 10

Old Colony Bondholders v. *N. Y. N. H. & H. R. R. Co.*, 161 F. 2d 413, 2 Cir., 1947, cert. den., 331 U. S. 858, rehearing den., 332 U. S. 803 ..... 5, 10, 11

Palmer v. *Massachusetts*, 308 U. S. 79 (1939), 5, 6, 6n, 8, 10, 13, 17n, 20, 22, 23

Palmer v. *Palmer*, 104 F. 2d 161, 2 Cir., 1939, cert. den., 308 U. S. 590 5

Palmer v. *Warren*, 108 F. 2d 164, 2 Cir., 1939, affd., 310 U. S. 132 5

Robinson & Co. v. *Belt*, 187 U. S. 41 ..... 19, 20

OTHER AUTHORITIES CITED:

Bankruptcy Act, as amended:
Section 24 (11 U. S. C. A., Sec. 47) 2
Section 25 (11 U. S. C. A., Sec. 48) 2
Section 77 5
Section 77(f) [11 U. S. C. A., Sec. 205(f)], 4, 6n, 10, 23

PAGE

Federal Rules of Civil Procedure:
Rule 8(b) 12n
Rule 8(d) 12n
Rule 10(c) 12n
Rule 17 ..... 1n

Interstate Commerce Act, Section 1(18)-(20) 22

Massachusetts General Laws:
Chapter 159 .....32, 33
Chapter 160 .....32, 33

Rules of the Supreme Court, Rule 38(2) 16

28 U. S. C. A.:
Section 1254(1) 2
Section 2101(c) 2

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The "Memorandum of Decision, Findings and Conclusions" of the District Court of the United States for the District of Connecticut has not been reported officially, but will be found at R. 5-12.[1] The opinion

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[1] This and similar references are to the "Transcript of Record" which is comprised of the Opinion, Judgment and Clerk's Certificate of the Court of Appeals for the Second Circuit, plus the small portion of the appellate record below that the parties printed in the Appendices to their briefs under that Court's Rule 17. We have been advised, however, that this Court will have

[Footnote continued on following page.]

of the Court of Appeals for the Second Circuit (R. 59 *et seq.*) is officially reported in 178 F. 2d 559.

Jurisdiction.

The judgment of the Court of Appeals was entered December 13, 1949 (R. 77, 78). Jurisdiction of this Court was invoked on February 10, 1950 under 28 U. S. C. A., Section 1254(1) within the time limited by Section 2101(e).

Statement of the Case.

A. Preliminary Statement.

An appeal was taken to the Court of Appeals for the Second Circuit under Sections 24 and 25 of the Bankruptcy Act, as amended (11 U. S. C. A., Secs. 47 and 48), by the Commission of the Department of Public Utilities of the Commonwealth of Massachusetts (hereinafter called D. P. U. or Petitioners) from an Order (R. 3-5) of the United States District Court for the District of Connecticut (Judge Hincks) entered April 25, 1949, in proceedings for the reorganization of The New York, New Haven and

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[Footnote continued from preceding page.]

the entire record in the Court below. In this brief, therefore, the letter "r" followed by a number refers to a printed page in the District Court record included in the record below, and the word "Item" followed by a number refers to numbered items in that record shown in the index we prepared and attached to it before it was transmitted to the Court of Appeals.

Much of the material in the larger appellate record had been printed earlier. A large portion of it has also appeared in the published reports of the Interstate Commerce Commission and in the Federal Reports, both of which are cited in this brief for additional ready reference.

Hartford Railroad Company (hereinafter called New Haven), Principal Debtor, and Old Colony Railroad Company (hereinafter called Old Colony), Secondary Debtor, construing the plan of reorganization "to sanction curtailment of the passenger service on the former lines of Old Colony", and perpetually restraining and enjoining all persons, including the D. P. U., from interfering with the curtailment of that service made on March 1, 1949 by the reorganized New Haven. The Court of Appeals affirmed the Order, one judge dissenting.

The construction of the plan was made by the District Court, and the injunction was entered, pursuant to reservations of jurisdiction in the "Consummation Order and Final Decree" by which the Court retained power to construe the plan as to matters which might require construction [Item 40, r. 13284(d)], and to take such further action as might be necessary to put the plan into effect and carry it out (Item 40, r. 13286),—the plan itself having provided in Section R that the Court's construction of it should be "final and conclusive" (257 I. C. C. at p. 57, Item 34, r. 10921).[2]

The curtailment of Old Colony passenger service was effected on March 1 under provisions in the plan which as a condition to requiring the New Haven to buy the deficit producing Old Colony property had, upon consummation, relieved both companies of any franchise and statutory obligations to operate the service and had substituted therefor a contractual

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[2] Section R states:

> "The construction of the plan by the court shall be final and conclusive. The court shall have the power to cure any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the plan effectively."

obligation to operate it only "if and so long as the losses therefrom do not exceed the critical figures provided below" (R. 50, 51, 257 I. C. C. at p. 52, Sec. N(2)(a), Item 34, r. 10910, 10911). The first critical period established by Section N(3)(a) of the plan ended on October 1, 1948 and the plan gave permission to discontinue the service if the losses in that period exceeded the sum of $850,000 (R. 52, 257 I. C. C. at pp. 52, 53, Item 34, r. 10912). The undisputed loss for the period was $3,848,484.62 (R. 11, 17). The contractual obligation to operate the service thus came to an end on October 1, 1948, all provisions of State law requiring operation having been superseded by the plan when it was consummated. Accordingly, the discontinuance was made at a time when all obligation to operate the service had ceased.

B. The Statute.

As we shall show herein, the foregoing plan provisions were devised and carried out pursuant to Section 77(f) of the Bankruptcy Act, as amended [11 U. S. C. A., Sec. 205(f)], the relevant portion of which reads as follows:

> "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

C. Statement of Facts.

(1) *The commencement of the New Haven reorganization proceedings.*

On October 23, 1935, the New Haven filed its petition for reorganization in the District Court under Section 77 of the Bankruptcy Act, and trustees were later appointed who operated the New Haven system, including the lines of Old Colony which had been leased to the New Haven in 1893 for a term of 99 years (*Palmer* v. *Palmer,* 104 F. 2d 161, 2 Cir., 1939, cert. den., 308 U. S. 590; *Palmer* v. *Warren,* 108 F. 2d 164, 2 Cir., 1939, affd., 310 U. S. 132). On June 1, 1936, the Old Colony lease was rejected because its lines had been operated "at a heavy deficit", and two days later it petitioned for reorganization in the New Haven proceedings as a secondary debtor (*Palmer* v. *Palmer, supra,* p. 162). Thereafter the New Haven trustees were appointed also trustees for Old Colony and continued the operation of the Old Colony lines for the account of that Company (*id.*). By December 31, 1943, the New Haven's prior lien claim against Old Colony on account of this deficit amounted to $6,081,048 (*Old Colony Bondholders* v. *N. Y. N. H. & H. R. R. Co.,* 161 F. 2d 413, 420, 2 Cir., 1947, cert. den., 331 U. S. 858, rehearing den., 332 U. S. 803).

(2) *Early unsuccessful efforts through court action (Palmer* v. *Massachusetts) to reduce the Old Colony passenger service deficits during the reorganization proceedings and thus facilitate reorganization of Old Colony.*

On June 20, 1938, certain New Haven creditors filed a petition in the District Court which resulted in an

order of that Court directing the New Haven trustees to discontinue stops of passenger trains at 88 stations in Massachusetts, most of them on Old Colony lines, but the Court of Appeals reversed the order (*Converse* v. *Commonwealth of Massachusetts,* 101 F. 2d 48, 49, 2 Cir., 1939) and this Court affirmed that reversal (*Palmer* v. *Massachusetts,* 308 U. S. 79, 88 [1939]) on the ground that:

> "it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, *except as part of a complete plan of reorganization for an insolvent road.*"[3]

(3) *Later successful efforts under the doctrine in Palmer* v. *Massachusetts to supersede, through a plan of reorganization, the portion of Massachusetts law that required the continued operation of the Old Colony passenger service.*

In its report and order of March 22, 1940 on the New Haven plan of reorganization (239 I. C. C. 337, 380-382, Item 24, r. 7917-7921) Division 4 of the Commission concluded that the acquisition at that time by the New Haven of the Old Colony properties and the assumption of responsibility for their future operation might impair the ability of the New Haven to render

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[3] As authority for the exception this Court quoted Section 77(f), *supra.* It added, page 89, that "Perhaps . . . amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, *do supplant state authority.*"

All emphasis herein is supplied unless otherwise noted.

efficient, economical and safe service on the remainder of its system inasmuch as the deficits from Old Colony passenger service would impose too heavy a financial drain on the system. See also 239 I. C. C. at p. 443, r. 7990. However, upon representations in petitions that large savings had been and would be effected in the operations of the Old Colony the Commission reopened the proceedings (261 I. C. C. 195, 202, Item 37, r. 11692); and by its First Supplemental Report and Order of February 18, 1941 (244 I. C. C. 239, Item 25, r. 8040), it authorized the acquistion of the Old Colony as a part of the New Haven plan of reorganization. That report provided, however, that the acquisition would be authorized only upon the condition that the New Haven would be permitted to abandon passenger service on the so-called Boston Group of Old Colony lines under certain conditions (p. 265, r. 8070; p. 298, r. 8112). These conditions were, as stated by the Court below, that

> "the Commission should estimate the average yearly loss and yearly savings for the years 1941 and 1942, or 1941 to 1945, if the Old Colony properties had not been operated as a part of the New Haven system, and that if the estimate as to the average yearly savings did not exceed the average yearly loss by an amount equal to the annual contingent interest charges on the income bonds issued in acquisition of the Old Colony properties, then 'the principal debtor or its successor shall thereafter be under no obligation to continue passenger service on the Boston Group of the Old Colony * * *' 244 I. C. C. 239, 263-65" (R. 61, 62).

The Commission noticed that the public authorities and communities were then keenly alive to the danger

that passenger service on the Old Colony lines might be discontinued in whole or in part, that they were cooperating earnestly in an effort to improve the situation (p. 264, r. 8069), and that possibly the charges in connection with the use of the South Station, which were responsible for part of the passenger service deficit, might be reduced in one way or another (p. 257, r. 8060).

When the plan came before Judge Hincks, he refused to approve an involuntary merger of the New Haven and the Old Colony on the terms proposed (Opinion on Plan, December 8, 1941, r. 8923, 8956, Item 27). His reason, among others, was that the New Haven would be required to acquire and pay for the Old Colony property without any effective assurance that the deficits from the passenger service would be eliminated or offset by other factors (r. 8956); and he pointed out that the provisions in the plan with respect to the passenger service were not adequate, practically or legally, to assure the elimination or reduction of the passenger service losses that the Commission itself had said was essential to any sound plan for the reorganization of the Old Colony (r. 8947). He concluded by commending to the Commission's consideration the Compromise Committee's report which suggested a solution of the service problems (r. 8956-8964).

In the Third Supplemental Report and Order of the Commission, issued October 6, 1942 (254 I. C. C. 63, Item 28, r. 9759), the Commission took full advantage of this Court's ruling in *Palmer* v. *Massachusetts, supra,* and provided that the New Haven and Old Colony should be relieved through the plan of all statutory and franchise obligations to operate the losing passenger service, with proviso that upon such relief the reorganized company should undertake a

contractual obligation to operate the service if and so long as the losses did not exceed the critical figures which the Commission established. Accordingly, in the latter part of 1942, the Commission cast the service provisions in substantially their final form and it has adhered to them since.

In its Fourth Supplemental Report and Order of July 13, 1943 (254 I. C. C. 405, 419, *et seq.*, Item 29, r. 10129, 10151, *et seq.*), the Commission made slight changes in the service provisions (pp. 422, 423, r. 10156, 10157), but refused to depart from its basic concepts, stating (p. 422, r. 10155) that the losses from the passenger traffic on the Old Colony had materially contributed to the difficulty of including the Old Colony in the New Haven's reorganization and that undoubtedly the efforts to include it had delayed that reorganization. In its opinion dated December 21, 1943 on the Fourth Supplemental Order, the District Court dealt at length with the service provisions (*In re N. Y. N. H. & H. R. R. Co.,* 54 F. Supp. 595, 614, *et seq.,* Item 33, r. 10695, 10728, *et seq.*), approved them and made certain constructions of them which the Commission itself approved in its Fifth Supplemental Report and Order of February 8, 1944 (257 I. C. C. 9, 17, Item 34, r. 10845). This was followed by the Court's opinion on the plan dated March 6, 1944 re-affirming its earlier rulings (54 F. Supp. 631, 635, Item 36, r. 11024, 11028). The Court of Appeals sustained the service provisions in 1945 (*In re N. Y. N. H. & H. R. R. Co.,* 147 F. 2d 40, 51, cert. den., *Commonwealth of Mass.* v. *The N. Y. N. H. & H. R. R. Co.,* 325 U. S. 884, rehearing den. 326 U. S. 805), saying in part:

"Whether the curtailment of service is required

> in the public interest was a matter for the Commission to decide. The general public interest of keeping an interstate railroad running must override the local public interest of Massachusetts if the Commission thinks the two incompatible. The contention is not persuasive that the Commission lacks the power by means of a plan of reorganization to amend the charters of New Haven and Old Colony or to relieve them of performing passenger service unless the state authorities give consent."

That Court relied on the language of Section 77(f) which we quoted in subdivision B, *supra,* of this brief and upon *Palmer* v. *Massachusetts, supra.* Its ultimate conclusion was "that a plan approved by the Commission may override state laws which the Commission finds incompatible with the plan it deems fair and equitable and in the public interest." The Court of Appeals, however, reversed the District Court's order of approval, and provided for a remand of the Old Colony features of the plan to the Commission, because it doubted whether the Commission had exercised its own independent judgment in determining the value of the Old Colony property and the price to be paid therefor.

In its Sixth Supplemental Report and Order of May 14, 1945 (261 I. C. C. 195, 202-204, Item 37, r. 11692-11694) the Commission adhered to the plan contained in the Fifth Supplemental Report and Order, *supra,* after having outlined the history of the passenger service provisions. Approval and confirmation followed in the District Court on August 31, 1945 (Item 39, r. 11891) and the Court of Appeals affirmed on January 13, 1947 (*Old Colony Bondholders*

v. *N. Y. N. H. & H. R. R. Co.*, 161 F. 2d 413). The "Consummation Order and Final Decree" was entered on September 11, 1947 (Item 40, r. 13249, *supra*), effective September 18, 1947 (Item 41, r. 13318); the Commission gave its approval (Item 42, r. 13319), and the Old Colony property was acquired and paid for by the New Haven under the plan of reorganization by deed dated as of September 18, 1947 (Item 43).

(4) *History of the operation of Old Colony passenger service by the New Haven (a) from September 18, 1947 to October 1, 1948 under the contractual obligation imposed by the plan following termination of franchise and statutory obligations and (b) from October 1, 1948 to March 1, 1949 after termination of the contractual obligation and during the period in which the New Haven, at the request of the Commonwealth, had agreed to extend the time for discontinuance.*

With the consummation of the plan as of September 18, 1947, the reorganized New Haven commenced to operate the Old Colony passenger service on a contractual basis for the twelve consecutive calendar months thereafter as provided in Sections N(2)(a) and N(3)(a) of the plan, the franchise and statutory obligations to operate it having ended; and the New Haven continued to furnish monthly statements of the loss both to the Governor of Massachusetts and to the D. P. U. as it had done since October, 1946 (Item 5, pp. 67-69). The loss figures left no doubt in the minds of anyone that on October 1, 1948, all obligation to operate the service would come to an end (Item 5, pp. 67-70; R. 17, par. 2; Item 7, pp. 5, 6, 15). Accordingly, before the October 1, 1948 deadline, the Governor of Massachusetts requested the New Haven to extend the time for discontinuance until March 1,

1949, which was done by the New Haven's Board of Directors upon the understanding that the rights of the company under the plan would remain unimpaired (R. 17, par. 2).[4]

On February 8, 1949, the New Haven's President released a statement, which had wide publicity and was discussed with the D. P. U., stating that on March 1 the Railroad would discontinue operation of (a) forty-five trains then operated Monday to Friday, inclusive, on the former Old Colony lines, (b) forty-one trains operating on Saturdays only, and (c) twenty-eight trains operating Sundays only (R. 17, 23). The remaining trains not scheduled for discontinuance handled over 80% of the public still using train service in the Old Colony area and it was believed that such remaining trains could handle about 90% of the public without undue change in their travelling habits (R. 23).[5] The decision was reached after a study of the riding on individual trains which indicated an increasing lack of public patronage on the ones scheduled for discontinuance on March 1 (*id.*). The purpose of discontinuing only some of the trains was to meet the situation with the least inconvenience to the public (*id.*).

On or about February 10, 1949, the Chairman of the D. P. U. requested the Attorney General for an

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[4] This reference is to the New Haven's petition to the District Court for construction of the plan and for an injunction. D. P. U. admitted all allegations of fact in the petition, and the correctness of all exhibits thereto, by failing to deny them in the answer it filed [R. 32, 33; F. R. C. P. Rule 8(d); see also Rules 8(b) and 10(c)]. On the record, the District Court found the facts to be as stated in the petition (R. 6). This situation should be borne in mind in connection with all statements in this brief supported by citation from the petition.

[5] Actual experience after the discontinuance showed that despite it 86% of the passengers formerly accommodated on all trains were being handled on the trains that remained (Item 5, p. 104).

opinion as to the legal rights of the Commonwealth in the premises, and on or about February 24, 1949 a copy of that opinion was made public (R. 18, par. 4). In it he stated that on the record the losses specified in the plan had been exceeded and that the authority to abandon all the service had been settled by the courts. He stated, however, that the problem posed by the D. P. U.'s question "has to do with partial operation of service" and he concluded that D. P. U. should compel the New Haven to comply with the provisions of State law. Curiously enough he relied for his conclusion upon *Palmer* v. *Massachusetts, supra,* upon which, as noted, the Court of Appeals, the District Court and the Commission had relied for the proposition that the State law was superseded by the plan.

On February 25, 1949, D. P. U. issued a statement in which it said that it would not interfere with the reductions (R. 18). Three days later, however, and at 4:45 P. M. on the last day before the new schedule became effective, the New Haven was notified that D. P. U. had issued or was about to issue a stop order, the purpose of which was to prevent the reductions in service on March 1.[6] It was then that the New Haven obtained from the District Court a restraining order temporarily restraining D. P. U. and others from interfering with the proposed reductions in service (R. 5, 18, Item 2).

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[6] A copy of the stop order as actually entered on February 28 appears in the record as Item 10. It orders that the service then being furnished on the Old Colony Division be continued in effect and that the proposed curtailment be deferred pending investigation and public hearing.

(5) *Court proceedings with respect to the Old Colony passenger service on and after March 1, 1949.*

On the next day (March 1) the New Haven filed its petition for construction of the plan and for a permanent injunction (R. 14) alleging, *inter alia,* that question appeared to exist in the minds of certain Massachusetts authorities as to the right of the Company to do less than abandon all the passenger service on the former Old Colony lines (R. 17); that the interference contemplated by D. P. U. through its stop order was apparently based on a misconstruction of the plan provisions with respect to the passenger service; and that such interference would prevent the service provisions from being put into effect (R. 19). The petition was fully heard and argued orally on March 8, 1949 (Item 5); and briefs and reply briefs were filed by the parties (Items 15, 19, 20; R. 6, 11, 34; Item 5, pp. 124, 125) on the very full record now before this Court. About five weeks later (April 14) the District Court filed its Memorandum of Decision (R. 5, 12), and on April 25 it entered the order thereon (R. 3-5) which is the subject of the D. P. U.'s petition to this Court.[7]

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[7] Compare the following statement of Judge Clark at the conclusion of his dissenting opinion (R. 77):

> "But if there is any value in appellate review at all, it must be in the deliberative approach afforded on full records, briefs, and arguments and not available to a district judge *faced of an afternoon* with a real crisis in railroading forced upon him by the precipitate and last-minute action of this commission. Moreover, in the lonely task of judicial adjudication, each of us must finally act as his own faculties demand. I would reverse for the purposes indicated."

D. Questions Presented.

All of the nine "Questions Presented" at pp. 3-6 of the petition state in different language a single question of law whether or not a bankruptcy court may make a material alteration in a consummated railroad reorganization plan after the Commission has refused to make such an alteration in it. This, according to the brief (p. 23), is the "real question" raised by the petition.[8]

The only possible answer to that question is no, for it is a commonplace that the Commission makes the plan and that the Judge cannot change or enlarge it either before or after consummation. He can, however, say what a plan means when anyone attempts to prevent it from being carried out because of lack of knowledge of its content, misconstruction of it, or wishful thinking as to its meaning. That is what he did in the present case after petitioners had ordered respondent to continue the passenger service then being furnished on Old Colony lines (Item 10) despite the plan provisions which gave respondent the undoubted right to discontinue all the service. This gave rise to the question in the Court below whether or not Judge Hincks abused his discretion in refusing to adopt D. P. U.'s "all or nothing" construc-

[8] The "real question" is distinguished by the draftsman from the "various questions" that "are set forth in full in the petition" (p. 23). Questions 1, 2, 3 and 8 are expressly based on an assumption that the District Court changed the Commission's plan. The same assumption is implicit in question 5 through the statement that the railroad made no averment of "subsequent changes in conditions" and no request or re-examination of the plan by the Commission. That assumption is likewise implicit in questions 4, 6 and 7 though they are so general as to be practically meaningless. As applied to the facts in this case, question 9 is not understandable. Compare, however, the closing statement of the Court below (R. 68).

tion of the passenger service provisions in the plan of reorganization and in his consequent holding that the New Haven, on March 1, 1949, could take off part of the service and continue the portion that served 86% of the public,—the plan having relieved the New Haven, prior to March 1, 1949, of every conceivable obligation, whether through franchise, statute or contract, to operate the service.

Petitioners might have asked this Court specifically to pass upon the meaning of the plan despite the findings of both Courts below that plainly it did not require the Railroad either to run all the passenger service on the Old Colony lines or immediately to deprive the citizens of Massachusetts of all that service. However, they have not asked this Court that question. Instead their petition assumes, contrary to the fact, that the District Court altered the plan, and this Court is asked to review the well settled rule that a District Court cannot do so.[9] This Court's Rule 38(2) states that "Only the questions *specifically* brought forward by the petition for writ of certiorari will be considered."

We, therefore, do not believe that either the petition or the supporting brief presents any substantial question to this Court under its rules relating to certiorari. At most a question as to the plan's meaning may be said to lurk in such of the "Questions Presented" (pp. 3-6) as assert that the District Court changed its meaning and also in the well settled but inapplicable rules of law that Petitioners say are involved (*ibid.*). Likewise a question as to the plan's meaning is possibly implicit in the statement that "Section 77 authorizes the amendment of the railroad's charter and the superseding of State charters

[9] The Court below pointed out (R. 68) that the rule is "of course, sound law, but wholly inapplicable."

and laws only as they are made an integral part of the plan of reorganization, first approved by the Interstate Commerce Commission" (p. 24) and that "the only power vested in the [District] Court is to see that the Plan is carried out according to its true intent" (p. 17). See also the statement at page 27 that a State's control over partial discontinuance of passenger service is paramount unless it conflicts with the order of the Interstate Commerce Commission "made within its field", viz., pursuant to a plan of reorganization.[10]

Petitioners do indeed argue at one point in their brief (pp. 31-33) that partial discontinuance of passenger service is not permitted under the plan because the Commission refused the Commonwealth's request "to permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures" (p. 32). Thus they do raise a question as to the plan's meaning, but without including that question specifically in their "Questions Presented" and without any real analysis of the plan's provisions in support of their position that the Commission's refusal to permit any limitation on the right to discontinue amounts to a positive command that all the service should be discontinued. However, we will cover in this brief the question as to the plan's meaning that was presented to the Court below despite the conspicuous absence of that question from the "Questions Presented" at pp. 3-6 of the petition.

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[10] Thus Petitioners have accepted the rule in *Palmer* v. *Massachusetts* for the purposes of this case.

ARGUMENT.

POINT I.

The petition should be denied because the ground upon which it is rested was not raised in either of the Courts below, and, moreover, is flatly inconsistent with Petitioners' claim in both those Courts.

Petitioners' claim in the District Court was that under the plan respondent must either continue all the passenger service or take it all off (Item 5, pp. 29, 30; see also p. 20).[11] The District Court dealt with and overruled that claim in its memorandum of decision (R. 8, 9). Petitioners then pressed the same claim as to the plan's meaning on the Court of Appeals, as evidenced by that Court's statement that "The Commonwealth of Massachusetts now makes the rather startling contention that these [plan] provisions mean that the New Haven must either discontinue all of the Old Colony passenger service or not discontinue any of it . . ." (R. 66). The Court below added that "To give such meaning to them [the plan provisions], however, would be unreasonable." Thus in both Courts below Petitioners' claim was that the reorganized company under the plan could either take off all the passenger service or continue to run all of it when the critical figures were exceeded, and that as a consequence it could not under the plan continue "only . . . .the most used and useful part of the service" (Petitioners'

[11] Petitioners' attorney said, in addition, "That is our exact position, your Honor, the position of the Attorney General of the Commonwealth" (Item 5, p. 30).

Answer in the District Court, Item 13, p. 3). Both Courts passed on that claim, and on no other claim.

However, Petitioners now say for the first time in their "real question raised by this petition" that "the expressed intent of the Interstate Commerce Commission" in the plan was "to *order* abandonment of passenger service on the Old Colony Division of the reorganized Railroad on the happening of certain contingencies" (Brief, pp. 23, 24), which contingencies, of course, were the exceeding of the critical figures.[12] Thus Petitioners are asking this Court by certiorari to review the decision below because the Court of Appeals did not hold that under the plan the railroad must take off all the service; but in both Courts below Petitioners' claim as to the meaning of the plan was flatly inconsistent with the claim here advanced for the first time as the ground for reversal.[13] If this Court ordinarily will not reverse for alleged errors not called to the attention of the Court below (*Robinson & Co.* v. *Belt,* 187 U. S.

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[12] This shift of ground cannot be laid to inadvertence or to typographical error, for Petitioners say also at page 33 of their Brief that:

> "It [the Commission], therefore, under the powers granted to it in Section 77, intended to incorporate in the Plan the provision that, when and if the passenger service on the Old Colony Division . . . caused losses exceeding the critical figures, the reorganized New Haven Railroad *must* abandon passenger service on that line."

Moreover, at page 15 of the petition it is stated "that in strict compliance with the provisions of the Reorganization Plan the railroad *must* abandon passenger service", and that after the critical figures had been exceeded "the railroad *could no longer operate* passenger service on the Old Colony Division."

[13] It will be remembered that on February 28, 1949 these Petitioners ordered Respondent to continue the very same passenger service that they now say Respondent should have taken off (Item 10), and that the present controversy was precipitated by that last-minute order.

41, 50; *Husty* v. *U. S.*, 282 U. S. 694, 701, 702; *Adams* v. *Mills*, 286 U. S. 397, 416, 417), we should hardly suppose it would grant certiorari for the purpose of considering a claim that is not only new, but is also inconsistent with a claim made in both Courts below.

POINT II.

The petition should be denied because the District Court's construction of the plan of reorganization was final and conclusive, no abuse of discretion being shown.

The present record shows good reason for the provision in Section R of the plan (257 I. C. C. at p. 57, Item 34, r. 10921) making the District Court's construction of it "final and conclusive." Judge Hincks was familiar with the early unsuccessful efforts to reduce the Old Colony passenger service deficits during the reorganization proceedings (*Palmer* v. *Massachusetts, supra*), and he himself took the initiative in having a committee formed to propose a solution of the Old Colony passenger service problem which was preventing the reorganization of that Company (Item 27, r. 8958; see r. 8956-64),—a solution that was ultimately embodied, with minor changes and additions, in the provisions of the approved plan that are involved in this case. Throughout the proceedings, as we have seen, the Commission and the Court worked cooperatively on these very provisions, and this Court will doubtless agree with the Court below (R. 65) "that matters of construction fall within the scope of district court discretion, no abuse of which has here been shown." If it does so agree, there would be no

need for this Court to grant the petition in order that it might determine whether or not a majority of the Court below was correct in the determination that "the construction put upon the plan by the [District] court . . ." was "*plainly* correct" (R. 65).

This is not to suggest that we think the meaning of the plan is not clear. On the contrary, it is our view that an abuse of discretion would have been involved in any holding that the New Haven could not, on March 1, 1949, continue the portion of the service that accommodated 86% of the travelling public. We mention the rule as to discretion only because it applies equally in cases involving either a plain meaning or an ambiguity. Indeed, an analogous rule was applied by this Court in *Institutional Investors* v. *Chicago, M. St. P. & P. R. R. Co.*, 318 U. S. 523, 564 [1942], where this Court said:

> "But we are not performing the functions of the District Court under §77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

The analogy is close inasmuch as the District Court passes on the matter of fairness and equity under subdivision (e), and under subdivision (f) the plan is to be carried out "under and subject to the supervision and control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

POINT III.

The District Court and the Court of Appeals were plainly right in holding that on March 1, 1949, the New Haven could take off part of the passenger service on the former Old Colony lines and continue operation of the remaining part that served 86% of the public.

A. Before March 1, 1949, the plan of reorganization had relieved the New Haven and Old Colony of every conceivable obligation to operate any part of the service.

Normally the State authority, not the Interstate Commerce Commission, is supreme where a carrier by railroad wishes to discontinue all or any part of its local passenger service without abandoning its entire operation or properties at the point in question under Section 1(18)-(20) of the Interstate Commerce Act. In Massachusetts, as elsewhere, the obligation to keep passenger service running stems either from the carrier's charter or from State regulatory statutes (compare *Commonwealth* v. *Fitchburg R. Co.*, 12 Gray (Mass.) 180 [1858] with *Brownell* v. *Old Colony R. Co.*, 164 Mass. 29, 32 [1895], and see *Palmer* v. *Massachusetts, supra,* p. 82, n. 2 and pp. 84, 85, n. 6). Because of this, prior to the Consummation Order and Final Decree in the New Haven-Old Colony proceedings, passenger service on Old Colony lines was operated successively by the New Haven (Debtor) and the trustees of its property pursuant to the requirements of State law that the service could not be diminished without State regulatory approval. But a complete plan of reorganization under Section

77(f) of the Bankruptcy Act may supersede that law (*Palmer* v. *Massachusetts, supra,* pp. 88, 89), as was done deliberately with respect to the passenger service in the very first sentence of Section N(2)(a) of the plan (R. 50).

The sentence states that "The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony shall be amended or superseded so that neither road will be under any *obligation* to operate passenger service on Old Colony lines". There is a period after the sentence, it is complete in itself and it erased all requirements of State law that the service be continued after consummation. But in order to require continuation of the service without change after consummation and during a trial period, Section N(2)(a) of the plan goes on to provide that the reorganized company shall "undertake a *contractual obligation* to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided" in another subdivision of the plan.[14] They were exceeded on October 1, 1948, and had they not been, the New Haven would have been obligated under the plan and its contract to continue operation of the service despite the earlier termination of all obligation under State law to operate it.

But for present purposes the successive changes wrought by the Commission in the nature and source of the obligation to operate the service are much

[14] The agreement was to take the form of a stipulation by the reorganized company before the Court, which stipulation was executed and approved (Item 44).

less important than the fact that the Commission's intention, clearly stated at this point in the plan, was merely to remove the obligation to run the service and not to issue any positive command that all or any part of it be taken off. Stated otherwise, and in general terms, the right to do something does not come to an end simply because all obligation to do it has ceased. If the Commission had intended to order cessation of the service it would have done so (compare Petitioners' brief, p. 33).

B. There is nothing in the words "may be discontinued" in Section N(3)(a) of the plan that suggests either a command to remove all the passenger service, or a prohibition against partial discontinuance of it, upon termination of the contractual obligation to operate it. Any thought that service must be taken off is negatived by the word "may".

As soon as the Commission, in Section N(2)(a) of the plan, had put an end to the requirements of Massachusetts law with respect to operation of the passenger service, and had provided for the termination of all obligation to operate the service if and when the critical figures were exceeded, it had established an effective control in the reorganized railroad over the quantum of service by removing any and all obstacles to the exercise of such control. Accordingly the "salient provisions pertinent to the issue here raised" are to be found in Section N(2)(a) of the plan and not in the later subdivision [Section N(3)(a)] which says that the service "may be discontinued" if the critical figures are met (compare Petition, p. 12). The earlier subdivision is the primary source of power: it ended all obligation under

Massachusetts law and substituted a contractual obligation which was to last only "if and so long as the losses" did not exceed those later to be specified. The words in the later subdivision, viz., "passenger service on Old Colony's lines may be discontinued if", and indeed the entire sentence in which they occur, is thus seen to be merely introductory to the Commission's precise specification of critical periods and critical figures which must be met in order to terminate the contractual obligation. Basically Section N(3)(a) is a yardstick and the words "may be discontinued" were used in recognition of the power that had already been granted in the plan.

But even if the words "may be discontinued" are viewed as a primary source of power, quite apart from the earlier plan provisions, it would still be true that the words contain no prohibition against voluntary operation of part of the service after all of it could be taken off. And surely *permission* to give up or put an end to the passenger service does not amount to a command that all of it must be taken off (compare the petition and brief, pp. 15, 23, 24, 33) or contain any implication that part of it may not be given up. Indeed Petitioners have found it necessary to overlook the discretionary word "may", and to argue from the word "discontinued" alone, in attempting to support their present claim that discontinuance of all the service became mandatory when the critical figures were exceeded.

Judge Clark's approach in his dissenting opinion was similar. Without considering the word "may" at all, he looked up the word "discontinue" in Webster's Dictionary and thought that it pointed to the "decisive" and "clean-cut step" of abandonment of all

the passenger service (R. 73).[15] Furthermore, he again overlooked the word "may" when he said (R. 74) "About the only thing looking in this direction", viz., in the direction of a "choice" between continuing or abandoning the service, was the provision as to the option giving Massachusetts the right to buy the Braintree line at salvage value if the Railroad " 'shall elect' to discontinue the service." And neither Judge Clark nor Petitioners have noticed how well the discretionary word "may" in Section N(3)(a) of the plan fits with the earlier language which instead of issuing any order merely removed "any obligation to operate passenger service." The right to run all or any part of the service is in no way affected by the removal of all obligation to run it and the grant of discretion in taking it off buttresses that conclusion.

Indeed to support the identical conclusions of both Courts below it seems hardly necessary to do more than to read the sentence in the plan removing "any obligation to operate passenger service on Old Colony lines" (R. 50) and the sentence thereafter stating that the service "may be discontinued if" the critical figures are exceeded (R. 52). However, though not vital to the validity of such conclusions, it is nevertheless interesting to know that there is evidence in

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[15] Judge Clark expressly disclaimed any intention himself to put forward "a final and definitive interpretation of the plan or answer to the problem" (R. 70, 74) because he thought that should not be attempted until "other interests, particularly the I. C. C., have been heard from." The Commission, however, did not appear or file any brief as *amicus curiae* or otherwise, either in the District Court or Court of Appeals, although it undoubtedly received immediately from the Clerk of the Court the various papers that were filed in the District Court, including our petition, the notice of later hearing, the memorandum of decision and the order of the District Court (General Order in Bankruptcy No. 49). Moreover, the District Court's order was entered on a full record and after full discussion (compare R. 74).

the record supporting the view that the word "discontinued" was thought from the beginning by all concerned, including the Commonwealth and the Commission, to mean "discontinued in part" as well as "discontinued in its entirety." At pages 61-64 of the record the Court of Appeals made an extensive review of the history of the plan provisions, and, at pages 66, 67, it summarized that history in answering D. P. U.'s then argument that under the plan the reorganized company had only the mutually exclusive rights (a) to run all the service, or (b) to take all of it off.[16]

The Court below also thought that the inclusion in Section N(3)(a) of the plan of the option in the Commonwealth to purchase the Boston-Braintree

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[16] The summary is repeated here for the convenience of this Court:

> "Indeed, the above recital of the background of this case shows that, when the Commission first made acquisition of the Old Colony properties a part of the plan, and first provided that [fol. 69] the reorganized company should be under no obligation to continue passenger service on Old Colony lines, it noted that the public was 'alive to the danger that service may be discontinued, in whole or in part . . .' 244 I. C. C. 239, 264. It further stated that it had the power to authorize as part of a complete plan of reorganization for an insolvent road 'a matter . . . such as the complete or partial discontinuance of passenger service,' as well as power, under Section 1(18) of the Interstate Commerce Act, to authorize abandonment of all of a given line. *Ibid.* Indeed, the Commission subsequently noted that the Commonwealth of Massachusetts itself considered that under the plan 'apparently curtailments could be made on all the Old Colony lines.' 254 I. C. C. 405, 421. Thus, the word 'discontinued' was thought from the beginning by all concerned to mean 'discontinued in part' or 'curtailed' as well as 'discontinued in its entirety.' While it is, perhaps, not of great significance, we thought similarly, for in *In re New York, New Haven & Hartford R. Co., supra*, we referred to 'the curtailment of service' allowed by the plan."

segment in the event of an election to discontinue passenger service on Old Colony lines was not of great interpretative significance inasmuch as the option was inserted in the plan at the request of the Commonwealth "after the New Haven's right to discontinue service had been fully crystallized" (R. 67). The Court added, however (R. 67), that the request for and grant of the option

> "would seem to indicate, not that they [the Commonwealth] were not interested in the public using the 'Western' and 'Cape' group lines, but, if anything, that they thought it likely that any discontinuance of service would take place, if at all, with respect to the segment of the lines which had in the past shown the largest operating deficits, and thus recognized that discontinuance could, and probably would, be a partial affair."

As we have shown (Point I, *supra*), Petitioners are now claiming that under the plan all of the passenger service "must" be discontinued. As a matter of fact the plan and the record will be searched in vain for any such peremptory requirement. Beyond this it is significant that the opinion given Petitioners by the Honorable Francis E. Kelly on or about February 24, 1949 (R. 27), states only that Respondent had "authority" to discontinue the service.[17] And any idea of a peremptory construction of the plan is negatived by the Governor Bradford request to the New Haven in 1948 that it extend the date for discontinuance to March 1 of the following year (R. 17).

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[17] He and others on his staff signed the petition and supporting brief filed in this Court.

C. Petitioners are in error in stating that prior to approval of the plan the Commission refused to provide in it for curtailment of Old Colony passenger service.

Petitioners say in their brief (pp. 2, 3) that any idea of curtailing the service was "expressly repudiated, by the Interstate Commerce Commission prior to approval of the Reorganization Plan as finally consummated."[18] As the Court below pointed out, the only basis for the argument lies in the rejection of the Massachusetts proposal to the Commission to "permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures" (R. 67; 254 I. C. C. at p. 421). First, and on its face, the Commonwealth's proposal was to engraft a limitation on the right to discontinue and the Commission simply refused to impose any limitation. Thus Petitioners' argument at this point really is that a limitation preventing the right to remove some of the service may be implied from the Commission's refusal to allow any limitation. The Court below found no basis for any such implication (R. 67); and Judge Clark apparently mis-read the proposal when he said that "This was an endeavor

[18] They make their argument at pp. 31-33; see also pp. 8, 14, 17, 22 and 23. In claiming in the Court of Appeals and here that the Commission repudiated any thought of partial discontinuance, Petitioners have again shifted ground. They said in their brief filed in the District Court (Item 19, p. 8):

> "As power to override state laws is vested solely in the Interstate Commerce Commission, *it cannot be fairly argued* that in passing on the provisions as to termination or cessation of passenger service, that the Interstate Commerce Commission *even considered partial discontinuance* of passenger service on the Old Colony and the Court would not be justified in making such assumption."

to have the plan *authorize* exactly what the New Haven now claims it has discretionary power to attempt" (R. 72). The proposal was not one to "authorize" anything despite the word "permit" that is found in it. Instead the substance of the proposal was to *prevent* any discontinuances below the amount needed to reach the critical figures. In the second place, the words "no more discontinuance" imply verbally that the word "discontinuance" is broad enough to include discontinuance in whole or in part, and the word "permit" was evidently used in recognition of the discretionary word "may".

D. The petitions for authority to curtail passenger service which were filed with D. P. U. by the New Haven during the first critical period are irrelevant in the present case.

During the first critical period, viz., on September 22, 1947 and February 9, 1948, the Railroad filed petitions for authority to make certain curtailments in passenger service (Item 5, pp. 8, 99).[19] It was then operating the service under the contractual obligation and was not free to take any of it off without permission. Therefore the petitions were filed as the only means of bringing about economies before the critical date, and they constituted no recognition of D. P. U.'s jurisdiction over the quantum of the service *after* the expiration of the critical period (compare D. P. U.'s brief, pp. 33, 34). However, in both its petition and supporting brief D. P. U. has changed

[19] It will be remembered that all franchise and statutory obligations to operate passenger service ended on September 18, 1947 when the plan was consummated and that the contractual obligation to operate the service ended on October 1, 1948 when the losses from the service exceeded the critical figure for the first critical period.

the date of the filing of the last petition from February 9, 1948, when it was actually filed, to "early in February of 1949" (pp. 10, 33) and has then made its present argument that the reorganized company invoked a jurisdiction that it now denies. Moreover the statement of facts in D. P. U.'s petition (p. 10) is so drawn as to create an impression that the stop order of February 28, 1949 was entered upon a petition of the reorganized company filed "early in February of 1949" for authority to make curtailments.[20] No such petition was filed, and the record will show that the stop order was entered because of the New Haven's announcement on February 8, 1949 that on March 1, 1949 it would discontinue operation of the forty-five Monday-Friday trains, the forty-one Saturday only trains, and the twenty-eight Sunday only trains (R. 17, 23; Item 10).

E. Petitioners are in error in stating that the District Court's construction of the plan deprived Massachusetts of all regulation of intrastate passenger service on the Old Colony Division.

D. P. U. contends in its brief that the result of the District Court's order was to deprive the Commonwealth of all regulatory power over intrastate passenger service on the Old Colony Division (Brief, p.

[20] The petition in this Court states (p. 10):

> "Early in February of 1949 the New Haven Railroad petitioned the said Department of Public Utilities for authority to curtail passenger service on the Old Colony Division. On February 28, 1949, the Department of Public Utilities, in accordance with the statute, Mass. G. L. (Ter. Ed.) c. 160, § 128, ordered the New Haven to continue unchanged the passenger schedule theretofore in effect on said Old Colony Division pending investigation and hearing."

37); see also pp. 8, 9 and 15.[21] That argument can no doubt be traced to Judge Clark's dissenting opinion below (R. 68, *et seq.*). He said in unequivocal language that the result of the District Court's action and the majority opinion was that "one of the most regulated of industries becomes *entirely free from regulation* at a time when the public need is greatest" (R. 69). His repetition of that statement three times in differing but emphatic language (R., pp. 70, 76) tends to suggest that he would not have dissented unless he had believed the statement to be correct. But there is utterly no foundation for it in the record or in the Massachusetts statutes; and Petitioners, though they are the regulatory authority in Massachusetts, have adduced nothing save assertion in support of it.

The record shows that approximately 86% of the persons in Old Colony territory who formerly used its trains before the March 1 discontinuance are still being served by the passenger service that is still being run on the Old Colony Division. A reading of Chapters 159 and 160 of the Massachusetts General Laws will show that D. P. U., despite the plan of reorganization, still has power to regulate the existing passenger service under about seventy separate sections of the Massachusetts law. These sections run the entire gamut between regulation of fares (Ch. 159, Sec. 14) and the placement and marking of drinking

[21] D. P. U. also makes the broader claim that the order "has freed the reorganized Railroad of *all* supervision by State regulatory power" (Brief, p. 37); but D. P. U. has not attempted to show how removal of State control over the amount of passenger service could possibly have ended regulatory power over freight service, other aspects of passenger service that is operated, or indeed the many other matters as to which railroad corporations and their operations are subjected to the exercise of regulatory power in Massachusetts.

cups in passenger cars (Ch. 160, Sec. 174). They include, among many others, safety appliances on passenger cars (Ch. 160, Sec. 176), the form and terms for the issuance of tickets (Secs. 187, *et seq.*), the furnishing of reasonable accommodation for the convenience and safety of passengers (Sec. 172) and the form and publication of rate schedules (Ch. 159, Sec. 19). Despite its statements to the contrary, therefore, it seems reasonable for this Court to assume that D. P. U. is now exercising the very regulatory authority over the passenger service that its brief in this Court denies. In truth the only authority that the plan denied it is the authority to say how much of the passenger service shall be run.

Conclusion.

Petitioners offer as their passport to this Court "an important question of Federal law" whether or not a District Court may change a railroad plan of reorganization after consummation (Petition, p. 6), but no such question is presented on this record. Both Courts below knew it was no part of their function to change the plan and neither Court made any change in it. Instead they dealt only with its meaning,—a question that Petitioners present to this Court only indirectly and through their assumption that somehow the plan's meaning was changed. Though Petitioners suggest a conflict of decision on the question of power to alter a plan (pp. 4, 5), there is in fact no such conflict or possibility of conflict on the well-settled rule, applied below, that only the Commission can make or alter a plan.

The filing of the petition poses merely a question as to why it was filed at all; for if it is successful, and if Petitioners' argument upon it is sustained, the ultimate result will be that the people the Attorney General claims to represent will find themselves without any passenger service on the former Old Colony lines. We submit that there is nothing in good sense, in the history of the plan provisions, in the content of those provisions, or indeed in Petitioners' arguments, that would compel us on March 1 to refrain from serving 86% of the people in Old Colony territory simply because the obligation to serve them has come to an end.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 661.

COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITION FOR REVIEW.

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PETITION FOR REVIEW.

Now come Thomas A. Flaherty, Edward N. Gadsby, John M. Whouley, David M. Brackman and James M. Carroll, as they are the Commission of the Department of Public Utilities, representing the Commonwealth of Massachusetts, and respectfully pray that this Honorable Court review the petition for writ of certiorari filed in the above-entitled matter by the said department, which petition was denied by the Court on April 24, 1950, and assign as reasons therefor the following:

I. The denial of petitioners' petition for writ of certiorari leaves in obscurity a grave and important question of law going to the heart of the plan which the Court of Appeals failed utterly to perceive so far as its majority decision indicates. That question involves the meaning of the Plan, which question was not included in the questions

specifically brought forward in the petition for writ of certiorari.

While the majority opinion of the Court of Appeals for the Second Circuit upholds the order of the District Court to the effect that the Plan did not require the Railroad to provide adequate passenger service on the Old Colony Division, that opinion did not specifically discuss the meaning of paragraph N (3) (a) of the Plan.

Paragraph N (3) (a) provides:

> "Passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for the initial critical period which shall comprise the 2 years following the consummation date or January 1, 1946, whichever shall be the later, shall be $850,000 for any 12 consecutive calendar months falling wholly within said initial critical period. The critical figure for any 24 consecutive calendar months, all of which shall be subsequent to the initial critical period, shall be $500,000. In the event that passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect, and if as a result thereof the reorganized principal debtor or the Old Colony shall elect to discontinue passenger service on Old Colony's lines, the Commonwealth of Massachusetts shall have the option of purchasing that portion of the Boston group lines extending from Boston to Braintree at the salvage value thereof which has been accepted for the purposes of the plan (the proportion of $2,328,895, the salvage value of the entire Boston group lines estimated in 1939, applicable to the Braintree branch), plus the depreciated amount of capital improvements made since the date of the appraisal, said option, however, to be limited to such facilities

appurtenant to said Boston-Braintree segment as shall reasonably be required by the Commonwealth of Massachusetts for its passenger operation and subject to a right in the reorganized company or in the Old Colony, as the case may be, to make joint use of such of said facilities as are not reasonably required for the exclusive use of the Commonwealth of Massachusetts; provided, however, that such option shall be valid only for a period of 10 years after the consummation of the plan; and provided further that in the event the Commonwealth of Massachusetts shall exercise the option provided herein, the reorganized principal debtor and the Old Colony shall so far as possible accord to the Commonwealth the right to use the Boston Terminal Company property on the same terms and conditions as possessed by the reorganized principal debtor and the Old Colony. Full jurisdiction shall be reserved to the court to determine at the appropriate time, if future controversies should arise, what facilities are in fact reasonably needed for such passenger operation by the Commonwealth and the salvage value thereof as established by the method indicated in the sub-section of the plan, and to enter any and all appropriate orders in the premises."

The majority decision of the said Court of Appeals held that the word "may" gives the Railroad the right to determine how much passenger service shall be given after the so-called critical figures have been reached. Thereafter it may continue such passenger service on the Old Colony Division as it elects. Withal, however, it still reserves the right to discontinue passenger service on the Old Colony Division in its entirety whenever it may so elect. In justification of its position the Railroad stated in its brief: "We submit there is nothing in good sense, in the history

of the plan provisions, in the content of those provisions, or indeed in Petitioners' arguments, that would compel us on March first to refrain from serving 80% of the people in Old Colony territory simply because the obligation to serve them has come to an end."

The history of the Plan clearly shows that the Interstate Commerce Commission indicated that paragraph N (3) (a) contemplated complete abandonment of passenger service on the Old Colony Division. That view was held by the District Court and the New Haven until the present proceedings began.

Early in the reorganization a committee of experts was appointed by the court to appraise the Old Colony, and they all reported that Old Colony could not be operated as a passenger line without a serious drain on the resources of the New Haven.

In its first report the Interstate Commerce Commission felt that bringing the Old Colony into the New Haven Railroad would cast a great burden upon New Haven, and hence it then made no provision for the Old Colony. Subsequently it held that a further trial period, in which the efforts on the part of all concerned to improve the situation by reducing passenger losses, should be continued. First Supplemental Report, 244 I.C.C. 239, 264, 265. Later a joint report induced the Interstate Commerce Commission to include the acquisition of the Old Colony properties in the reorganized New Haven. The Commission, however, based that finding "upon the premise that the passenger losses of the Old Colony would be eliminated or largely reduced." Third Supplemental Report, 254 I.C.C. 63, 88. In the Fourth and Fifth Supplemental Reports the Interstate Commerce Commission rejected any proposals to modify that plan.

By Section N (2) (a) the Commission provided that the charters of the reorganized New Haven and of Old Colony

shall be amended so that neither road will be under any obligation to operate passenger service on Old Colony line. The reorganized company shall, however, undertake a contractual obligation to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided below.

Although section N (3) (a) states that passenger service on Old Colony may be discontinued, the definite statement in section N (2) (a) that passenger service shall be operated if and so long as the losses do not exceed the critical figures indicates that the Commission intended the permissive words in section N (3) (a) to be interpreted from the national or federal viewpoint; that is, that passenger service on Old Colony should be continued only so long as the losses therefrom do not put an undue burden on interstate commerce.

Yet, if the decision of the court below be permitted to stand, the reasoning of the Interstate Commerce Commission would be totally disregarded and the words in section N (3) (a) can only be held to mean that, even though the burden on interstate commerce continues, the reorganized Railroad is justified in continuing at will passenger service on the Old Colony Division regardless of its effect on interstate commerce. Thus there is presented an important and crucial question which ought to be determined by this Honorable Court. As the matter now stands, by denial of petitioners' writ of certiorari, and as the Railroad admits in its brief, the amendment of the state charters by paragraph N (2) (a) only penalizes or deprives a sovereign state of some of its inherent powers, whereas the Railroad may, so long as it desires, continue to operate without check or hindrance. Certainly no court would hold that deprivation by paramount power of state rights has only a unilateral effect.

II. Nowhere in the Railroad petition, in the decisions or reasoning thereon, has any mention of or consideration been given to the fundamental and basic question involved. That question is: What is the effect on interstate commerce? Is the reorganized Railroad aiding or burdening interstate commerce by continuing partial passenger service on its Old Colony Division? The record shows that the passenger loss for one year alone aggregated $3,848,-484.62. Is it reasonable to hold that, even with the economies purportedly created by the Railroad's action in partially discontinuing passenger service, a loss of at least two million dollars per year can be held not to burden interstate commerce? That question can only be answered by a decision of this Honorable Court as to the precise meaning of the specific clauses hereinbefore enumerated. Is it reasonable to assume that a court is warranted in stating that the Interstate Commerce Commission intended by those clauses to permit a regulated industry to be freed from all regulation? Further, would the court be warranted in dismissing th petition merely because a decision on the matter would inevitably work hardship on the intrastate commuting public?

Further, mere temporary relief under the charitable or benevolent will of a railroad offers no real solution of the problems facing the nation or the Commonwealth of Massachusetts, especially the commuting public. If the people must eventually face the problem of providing other means of transportation, a clear-cut decision of the real meaning of the salient clauses of the Consummated Reorganization Plan would be of great assistance in meeting such eventual crisis and would be particularly illuminating to the problems facing reorganization matters of the other railroads of the nation.

Thus there is presented in this petition a definite, important question which the Court should decide.

That question is whether a court may read into certain clauses of the Reorganization Plan a meaning entirely distinct from that intended to be given by the Interstate Commerce Commission.

The petitioners therefore respectfully appeal to the discretion of this Honorable Court and request that they be given an opportunity to be heard on the many points involved. A clear and concise opinion from this Honorable Court will do much to prevent the confusion that will result should the decision of the court below be permitted to stand.

Respectfully submitted,

COMMISSION OF THE DEPARTMENT
OF PUBLIC UTILITIES,

By FRANCIS E. KELLY, Attorney General,

By Francis J. Roche,
Assistant Attorney General,

David H. Stuart,
Assistant Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 661.

COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

CERTIFICATE OF COUNSEL.

I, David H. Stuart, Assistant Attorney General, counsel for the petitioner in the above-entitled matter, do hereby certify that this petition for review by the Supreme Court of the United States is presented in good faith and not for delay.

DAVID H. STUART,
Assistant Attorney General.

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MAY 15 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 661.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONSE TO "PETITION FOR REVIEW".

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THE COURT PRESS, N. Y. C.

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Respondent.

Response to "Petition for Review".

Both Courts below have told Petitioners in no uncertain language and with great particularity just what the plan of reorganization means with respect to the passenger service on Old Colony lines (R. 8-11—District Court; R. 65-68, and elsewhere—Court of Appeals). Indeed the plan's meaning was the only issue presented in the case; and it never would have arisen at all if Petitioners had not changed their minds at the last minute and issued a stop order

which would have prevented the carrying out of the plan in accordance with what both Courts below have found to be its plain meaning (Brief in Opposition, p. 13).

Having lost successively in the District Court and in the Court of Appeals, Petitioners then shifted their ground again and asked this Court to review and reverse the judgment below because they had concluded, after giving the matter further thought, that the plan had a different meaning from the one they had urged on the Courts below.[1] The petition was denied on April 24, 1950. Petitioners have now filed a so-called "Petition for Review", without any certificate that it is presented in good faith and without certifying that it is restricted to any particular ground [Rule 33(2)], in which they say that the plan's meaning is obscure and that they did not raise a specific issue as to its meaning in their petition.[2]

The shifting claims of the Commonwealth's present representatives with respect to the plan's meaning do suggest that its meaning has been obscure to them,—at least since February, 1949. But an obscurity so

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[1] The new claim was that the plan *required* the Railroad to take off all the service instead of permitting the Railroad either (a) to run all the service *or* (b) to take all of it off (Brief in Opposition, pp. 18-20).

[2] At most we think there was a technical non-compliance with this Court's Rule 38(2) in this respect (Brief in Opposition, p. 16), but Petitioners' latest view as to the meaning of the plan was implicit in several of the "Questions Presented" and that view was clearly asserted in their brief at pages 31-33. See Brief in Opposition, pages 16, 17. The Petition for Review adds nothing new except an altruistic suggestion, not based upon anything in the record, that the curtailed service is operated at a loss to us of at least $2,000,000 a year and that those who use it should be deprived of it in order to remove a burden on interstate commerce (p. 6).

limited and subjective cannot properly be said to give rise to a "grave and important question of law" (Petition for Review, p. 1) under this Court's rules relating to certiorari inasmuch as only the Commonwealth's representatives have had difficulty in interpreting the plan. We respectfully submit that no genuine question as to the plan's meaning exists anywhere except, possibly, in the minds of certain representatives of the Commonwealth.

Respectfully submitted,

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